

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

BLOCK BROTHERS INDUSTRIES (USA),)
INC., and ROBISON CONSTRUCTION,)
INC.,)

PCHB NO. 89-111

Appellants,)

v.)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,)

Respondent.)

Block Brothers Industries (USA) Inc., ("Block Brothers") and Robison Construction, Inc., ("Robison") are contesting Puget Sound Air Pollution Control Agency's ("PSAPCA") issuance of Notices of Violation and Notices and Orders of Civil Penalties (\$2,000) land clearing burning on August 14 and 15, 1989 allegedly without a lawful Population Density Verification in violation of Section 8.02(b) of Regulation I.

1 The hearing was held before the Pollution Control Hearings Board
2 on December 12, 1989. Present for the Board were Members Judith A.
3 Bendor, presiding, Wick Dufford and Harold S. Zimmerman.

4 Appellants Block Brothers and Robison were represented by
5 Attorney H. Jane North of Gordon, Thomas, Honeywell, Malanca, Peterson
6 & Daheim (Tacoma). Respondent PSAPCA was represented by Attorney
7 Keith D. McGoffin of McGoffin and McGoffin (Tacoma). Court reporter
8 Kathryn A. Bechler of Gene Barker and Associates recorded the
9 proceedings.

10 Testimony was heard. Exhibits were admitted and examined.
11 Argument was made. From the record, the Board makes these:

12 FINDINGS OF FACT

13 I

14 Block Brothers are property owners and developers of an area
15 known as Harbor Ridge Estates in northeast Tacoma. This development
16 is about 190 acres in size, and was started about 3 years ago.
17 Robison Construction Company is the primary general contractor for
18 Block Brothers for this project.

19 Stewart Graecen is a developer who had an oral agreement with
20 Block Brothers to jointly develop property in Harbor Ridge Estates.
21 In August 1989 Block wanted to clear 15 acres in the estates before
22 September 1, 1989. They arranged with Robison to clear and burn the
23 property using a Population Density Verification and a City of Tacoma
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1 fire permit obtained under Graecen's name. Robison had previously
2 done land clearing and burning at the Estates. The August 14 and 15,
3 1989 burn piles were on Block Brothers property and contained land
4 clearing material from their property.

5 II

6 PSAPCA is a municipal corporation with authority to conduct a
7 program of air pollution prevention and control in a multi-county area
8 which includes the City of Tacoma, the site of the burning in question.

9 The Board takes notice of PSAPCA's Regulation I, including
10 Article 8, which deals with outdoor fires.

11 III

12 Outdoor land clearing fires were allowed under PSAPCA Regulation
13 I, under strict controls and close regulation, Section 8.01, and under
14 former Section 8.06 where the general population density is less than
15 2,500 per square mile.

16 "Land clearing burning" was defined in Section 1.07(y) as follows:

17 "Land clearing burning" means outdoor fires consisting of
18 residue of a natural character such as trees, stumps,
19 shrubbery or other natural vegetation arising from land
20 clearing projects and burned on the lands on which the
material originated.

21 PSAPCA had a procedure whereby a person intending to do land
22 clearing- burning applied for what was known as a "PDV" (Population
23 Density Verification.) Using a form and map supplied by PSAPCA, the
24 applicant informed the agency where they intended to burn. Then
25

1 PSAPCA calculated the population density within .6 miles of the burn,
2 a square mile area, using 1980 census data.

3 Former Section 8.06 was repealed in early 1989, but continued to
4 govern burning under pre-existing PDV's until September 1, 1989.

5 IV

6 On January 11, 1989 PSAPCA issued a Population Density
7 Verification ("PDV") to Stewart Graecen for land clearing burning.
8 The PDV was valid until September 1, 1989. The PDV Application form
9 submitted by Graecen listed Graecen as the applicant, the property
10 owner and the person responsible for the burning, and listed Harbor
11 Ridge Drive and Bay Place N.E. as the cross-streets where the burning
12 would be conducted.

13 Graecen understood the street listing to mean the nearest
14 existing cross-streets to where the burning was going to be done. A
15 Thomas Brothers map was provided by PSAPCA for the applicant, attached
16 to the application form. The applicant brought the form and map to
17 PSAPCA. Someone marked an "X" on the map at the proposed location of
18 the burns. It has not been established who made this mark. In fact,
19 the "X" was a considerable distance (over .6 miles) from the
20 cross-streets listed by Graecen and from the actual burn piles.

21 A PDV was issued, stating that 1,949 people were within a square
22 mile area, less than 2,500 so burning was allowed.

23 As later discovered, PSAPCA had determined the .6 mile
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1 radius/square mile based on the "X" location on the PDV application
2 map, not based on the location of the listed cross-streets.

3 PSAPCA's witness on the PDV calculation did not have direct
4 knowledge who made the "X" mark, and was unable to explain why the PDV
5 was not calculated from the listed cross-streets.

6 V

7 On August 5, 1989 the Tacoma Fire Department issued a burning
8 permit to Graecen with an August 25, 1989 expiration date, for burning
9 at Harbor Ridge Drive and Bay Place Drive. (Past permits had been
10 issued in January for the same location with an expiration date
11 through May 1989.) The Fire Department permit stated on the front
12 that it was "non-transferrable."

3 VII

14 On August 14, 1989 in response to a complaint about a fire, a
15 PSAPCA air pollution inspector drove past the complainant's house and
16 found that there was no adverse impact on complainment. He then drove
17 to Harbor Ridge Estates where he saw two separate fire piles that were
18 about 750 feet from the intersection of Harbor Ridge Drive and Bay
19 Place NE. (Exh. A-2) A machine was loading land clearing debris into
20 the piles. The machine operator worked for Robison Construction. The
21 inspector found the Robison site manager. After speaking with him and
22 seeing a copy of the Graecen PDV, and the Tacoma burn permit, and
23 another document, the inspector stated that there might be a problem
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1 and that he would check further. He did not instruct Robison to put
2 out the fire.

3 The inspector returned to the site the next morning, August 15,
4 1989 at 8:15 a.m. The inspector had not contacted anyone with
5 Robison, Block Brothers, or Greacen between his two visits. The
6 fires were still burning.

7 VIII

8 On August 16, 1989 four Notices of Violation were sent (No.
9 026056, 57, 58 and 59) to Block Brothers and Robison alleging
10 violations of Section 8.02(a)(4) and 8.02(b) Regulation I for unlawful
11 outdoor fires on the preceeding two days.

12 The Notices further stated, under the Corrective Action Notice
13 section, that the parties were not to burn further in the No-Burn Zone.

14 IX

15 Prior to the incidents, Block Brothers had done land clearing
16 burning at Harbor Ridge Estates for about 18 months. Their
17 contractors, purchasers or suppliers obtained the permits. Different
18 PDVs had been obtained for different burns.

19 In July 1988 Robison had obtained a PDV for burning at Harbor
20 Ridge Estates listing cross-streets at NE 51st Street and Silver Bow
21 Road. The burning was done in areas I and II-A of the Estates (Exh.
22 A-2), a distance of about 750 feet from the listed cross-streets.

23 Robison received a Notice of Violation from PSAPCA for these
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1 burns during a burning ban instituted in response to a temperative
2 inversion, but was not advised that the burn piles were improperly
3 located in relation to the PDV. After discussions with the Agency, no
4 penalty was issued and Robison was allowed to continue burning.

5 The cross-streets listed on the 1988 PDV were about one-third of
6 a mile from the 1989 burn sites.

7 X

8 Procedural History

9 On August 18, 1989 Block Brothers and Graecen requestd PSAPCA
10 withdraw the Notices of Violation. They also appealed the Notices to
11 the PCHB on August 22, 1989. This appeal became our PCHB 89-111.

12 Oral argument on a request for stay was held August 22, 1989
13 before Administrative Appeals Judge William A. Harrison. That day the
14 stay was denied by oral ruling. (The parties presented the Order
15 Denying Stay on November 30, 1989 and it was entered.)

16 On September 14, 1989 a formal hearing was scheduled for December
17 12, 1989. On September 22, 1989, PSAPCA issued Notices of Civil
18 Penalty (No. 6992 for August 14, 1989; No. 6993 for August 15, 1989)
19 assessing a \$1,000 civil penalty for each day, \$2,000 total, alleging
20 violations of Section 8.02(b) only. On October 10, 1989 appellants
21 filed with PSAPCA an Application for Relief from Penalty. This was
22 denied. The parties stipulated at the hearing and the Board ordered
23 that the appeals of the Notices of Violation and the Notices of Order
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1 of Civil Penalties be combined.

2 XI

3 We find that it had been PSAPCA's practice to allow burning
4 within a reasonable distance of the street intersections listed on PDV
5 application forms, and had not interpreted its own regulations to
6 require burning precisely within these intersections. We find further
7 that the burning on August 14 and 15, 1988 was conducted within a
8 reasonable distance of the Harbor Ridge Drive and Bay Place N.E.
9 street-crossing.

10 XII

11 Any Conclusion of Law deemed to be a Finding of Fact is hereby
12 adopted as such. From these Findings of Fact, the Board makes these:

13 CONCLUSIONS OF LAW

14 I

15 The Pollution Control Hearings Board has jurisdiction over these
16 persons and these matters. Chapters 43.21B and 70.94 RCW.

17 Respondent PSAPCA has the burden of proof in this case.

18 II

19 Section 8.02(b) of Regulation I makes it unlawful to cause or
20 allow land clearing burning in any area where the Board has prohibited
21 land clearing burning. Except for those persons with an effective
22 PDV, PSAPCA had prohibited land clearing burning at the sites in
23 question.
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III

PSAPCA's Notices and Orders of Civil Penalty allege that Block Brothers and Robison did not have a valid PDV, and therefore caused or allowed an outdoor fire in an area where burning was otherwise not permitted. As relevant here, Section 8.06 stated:

It shall be unlawful for any person to cause or allow any other fire for land clearing burning. . . . (3) within the urbanized area as defined by the United States Bureau of Census unless the agency has verified that the average population density of the land within 0.6 miles of the proposed burn site is 2500 person per square mile or less.

IV

PSAPCA contends that the PDV issued to Graecen could not validly be used by appellants. This contention has not been supported by reference to specific regulatory requirements, statute or case law. Section 8.06(3) refers to a verification of a state of facts and does not refer to a permit personal to the entity receiving it. Moreover, unlike the Tacoma Fire Department burn permit, the PDV does not state on its face that it is "non-transferrable." We recognize that when the PDV system was in effect, it was important to PSAPCA to have correct information about who owned the property on which the burning would occur, and who was responsible for the burning. But we find no basis for concluding that such errors in completing the form rendered the PDV inoperative.

1 We conclude that there was no per se violation in using the
2 Graecen January 11, 1989 PDV for the August 14-15, 1989 land clearing
3 burns.

4 IV

5 The key issue is whether appellants burned in an area where they
6 had a valid PDV (Exh. A-9). We conclude the the geographic coverage
7 of the Graecen PDV should be interpreted in accordance with PSAPCA's
8 past conduct and that, as so interpreted, the sites of the burns on
9 August 14 and 15, 1989 were covered. PSAPCA apparently erroneously
10 made its calculation based on the "X" on the PDV form. PSAPCA did not
11 prove that either appellants or Graecen made this mark. Therefore, we
12 conclude that PSAPCA has not demonstrated appellants' responsibility.
13 Appellants were entitled to conclude that the Graecen PDV was based on
14 the listed cross-streets of Harbor Ridge Drive and Bay Place Drive.
15 Moreover, respondents had a valid basis to assume that burning within
16 about 750 feet of the listed cross-streets was acceptable under the
17 January 11, 1989 PDV.

18 Because the PDV provided authority to burn under Section 8.06(3),
19 we conclude appellants did not violate Regulation I, Section 8.02(b)
20 on August 14 or 15, 1989. PSAPCA's Notices and Orders of Civil
21 Penalty did not recite violations of Section 8.02(a)4, nor did they
22 litigate that section. Therefore, no violation has been proven.
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V

While concluding there was no liability, we nonetheless take this opportunity to question the purpose behind assessing a second civil penalty on August 15, 1988 so hard on the heels of the first penalty. Appellants had not yet even been informed that they were engaging in unlawful activity. To the contrary, on August 14, 1989 appellants were left with a question mark, which the PSAPCA inspector said he would research further. The purpose of civil penalties is to encourage compliance. This goal is not served by such a second civil penalty assessment, even if liability were to have been found.

IV


Any Finding of Fact deemed to a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this:

ORDER


Notices of Violation Nos. 026056, 026067, 026058 and 026059, and
Notices and Orders of Civil Penalty No. 6992 and 6993 are
REVERSED

DONE this 29th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member